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October 12, 2001

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

WorldCom, Cox, and AT&T ads. Verizon
CC Docket Nos. 00-218, 00-249, and 00-251

Dear Ms. Salas:

Enclosed for filing on behalf of Verizon, please find 4 copies of Verizon Virginia Inc.'s Renewed Motion to Dismiss Consideration of Issues Related to Performance Measures and Assurance Plans.

Please do not hesitate to call me with any questions.

Sincerely,

Kelly L. Faglioni

Kelly L. Faglioni
Counsel for Verizon

KLF/ar
Enclosures
cc: Dorothy T. Attwood, Chief, Common Carrier Bureau (By Hand) (8 copies)
Jeffery Dygert (w/o encl.)
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Expedited Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration	)	CC Docket No. 00-218
In the Matter of Petition of Cox Virginia Telecom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc. and for Arbitration	)	CC Docket No. 00-249
In the Matter of Petition of AT&T Communications of Virginia Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia Corporation Commission Regarding Interconnection Disputes With Verizon Virginia Inc.	)	CC Docket No. 00-251

VERIZON VIRGINIA INC.'S RENEWED MOTION TO DISMISS CONSIDERATION OF ISSUES RELATED TO PERFORMANCE MEASURES AND ASSURANCE PLANS

The Commission should dismiss issues relating to performance measures and remedies (Issue Nos. III-14, IV-120, IV-121, and IV-130 see Attachment A) for two reasons.

First, the Commission lacks jurisdiction to address these issues. By its express terms, section 252(e)(5) allows the Commission to preempt a state commission's jurisdiction only

where that state commission "*fails to act* to carry out its responsibility under [section 252]." That section cannot be invoked here for the simple reason that the Virginia Commission has not failed to act. Quite the contrary, it has continued to consider the issues of performance metrics and performance assurance plans. The Virginia Commission did so in the form of an industry collaborative proceeding of the precise type that this Commission has previously endorsed. *See In re Establishment of a Collaborative Committee to Investigate Market Opening Measures*, Case No. PUC000026 (the "Virginia Collaborative"). As part of that proceeding, the Virginia Commission has agreed to act on—and determine—exactly the issues that are raised in Issues III-14, IV-120, IV-121, and IV-130.

Second, even aside from the fact that the Commission cannot exercise jurisdiction, it *should not* exercise jurisdiction as a matter of comity. This group of issues raised by Petitioners is pending and will be decided in a proceeding before the Virginia Commission in which all interested parties, including AT&T and WorldCom, are participating. It is therefore unnecessary and inappropriate for the Commission to decide these issues. Moreover, the role of performance measurements or a performance incentive plan in providing appropriate incentives to ensure an open and competitive market is an inquiry much broader—and involving many more parties—than the inquiry into the rights and obligations of particular parties to an interconnection agreement. Recognizing the merits of this approach, many states have adopted state- and industry-wide collaborative and voluntary forums where all parties interested in the ILECs' incentives to ensure an open and competitive market can participate.[1] The Virginia

[1] *See* Order Adopting Inter-Carrier Service Quality Guidelines, *Proceeding On Motion Of The Commission To Review Service Quality Standards For Telephone Companies,* Case No. 97-C-0139 (N.Y. Pub. Serv. Comm'n, February 16, 1999) (adopting state-wide carrier-to-carrier performance measures); Order, *In The Matter Of The Investigation Regarding Local Exchange Competition For Telecommunications Services*, Docket No. TX98010010 (N.J. Bd. of Pub. Utils., July 13, 2000) (adopting

Commission is conducting such a proceeding, and that is where these issues should be determined.

ARGUMENT

I. THE COMMISSION IS WITHOUT JURISDICTION UNDER SECTION 252(e)(5) OF THE ACT BECAUSE THE VIRGINIA COMMISSION HAS NOT FAILED TO ACT WITH RESPECT TO PERFORMANCE MEASURES AND PERFORMANCE ASSURANCE PLANS.

The Commission has preempted the Virginia Commission's jurisdiction of these arbitrations, at the request of Petitioners, pursuant to 47 U.S.C. § 252(e)(5) of the Act.[2/] Under the plain terms of that section, the Commission may assume jurisdiction if and only if the Virginia Commission "fails to act."[3] Here, however, the Virginia commission has not failed to act with respect to performance standards and performance assurance plans. To the contrary, the

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state-wide carrier-to-carrier performance measures, after which additional meetings were held to attempt to reach a consensus on remedies for inadequate performance); Order Adopting Performance Assurance Plan, *Investigation By The D.T.E. Upon Its Own Motion Pursuant To Section 271 Of The Telecommunications Act Of 1996 Into The Compliance Filing Of Verizon New England, Inc. As Part Of Its Application To The FCC For Entry Into The In-Region InterLATA (Long Distance) Telephone Market*, D.T.E. 99-271 (Mass. Dep't of Telecomm. and Energy, September 5, 2000) (adopting Verizon's New York-approved state-wide performance assurance plan, which was developed through the carrier-to-carrier proceeding cited above). *See also, DPUC Promulgation Of Performance Standards And Performance Based Reporting Requirements Regulations For Connecticut Telephone Companies*, Dep't of Utils. of Conn. Docket No. 99-07-27 (open docket considering state-wide performance measures); *Section 271 Compliance Monitoring Of Southwestern Bell Telephone Company Of Texas*, Pub. Util. Comm'n of Texas Project No. 20400 (same); *In The Matter Of The Investigation Into US West Communications, Inc.'s Compliance With Section 271 Of The Telecommunications Act Of 1996, et al*, Wash. Utils. and Transp. Comm'n Docket Nos. UT-003022 and 003040 (same).

2/ *FCC Preemption Orders*, *supra*, n.2.

3/ Moreover, section 252 (e)(5) allows the FCC to assume jurisdiction only to the extent that a state commission fails "to carry out its responsibilities *under this section*." But as at least one court has pointedly noted, the 1996 Act "contains no provisions requiring a public utility commission to create detailed performance standards [and] does not specifically delineate the powers of the public utilities commissions with respect to" liquidated damages and penalty provisions. *U.S. West Communications, Inc. v. Hix*, 57 F. Supp. 2d 1112, 1121 (D. Colo. 1999).

Virginia Commission has acted, and is in the process of setting performance standards in the Virginia Collaborative proceeding.

Petitioners may argue that the Virginia Commission's denial of their initial requests for arbitration somehow renders moot the state commission's ongoing proceeding. A similar argument was rejected in *Indiana Bell Telephone Co., Inc. v. Smithville Telephone Co., Inc.*, 31 F. Supp. 628 (S.D. Ind. 1998). In that case, Ameritech asked the Indiana Utility Regulatory Commission (IURC) to arbitrate its request for interconnection with rural ILECs. The IURC denied that request pending the completion of an investigation into extended area service agreements between Ameritech and the rural ILECs and ordered the parties to submit interim agreements. Ameritech appealed the denial of its request to the federal district court.

The district court concluded that the IURC's denial of Ameritech's request for arbitration was not a refusal to act for purposes of section 252. *Id.* at 641-42. The court first found that the proceedings contemplated by the IURC instead of the arbitration were not inconsistent with the Act. *Id.* at 641. It then concluded that in light of those other proceedings, the denial of Ameritech's request to arbitrate should not "be considered a refusal by the IURC to act under § 252." *Id.* at 642. Likewise, in this case there is no basis to suggest that the Virginia Collaborative proceeding in which Petitioners are willingly involved is inconsistent with the Act, and the Virginia Commission's actions cannot be considered a failure to act that gives rise to Commission jurisdiction.

Of course, this is fully consistent with the well established rule that regulatory commissions have broad discretion over the conduct of their own proceedings, and are entitled to structure proceedings in such a manner as to resolve issues in an efficient and coherent manner. That same principle holds true whether the commission at issue is a state commission or the FCC

(acting either in its own right or in the shoes of a state commission). In contrast, the contrary conclusion urged by the petitioners would be utterly unworkable (and irrational). Like the FCC, the state commissions have long elected to resolve issues of general applicability (such as setting prices and establishing performance measures and incentive plans) through separate proceedings in which all interested parties are allowed to participate rather than in narrow arbitration proceedings between individual parties. The result urged by the petitioners here, however, would deny the state commissions (and ultimately this Commission) the ability to do so.

II. THE COMMISSION SHOULD DISMISS ISSUES RELATING TO PERFORMANCE MEASURES AND PERFORMANCE ASSURANCE PLANS AS A MATTER OF COMITY.

A. The Virginia Commission and Its Industry Collaborative Are Uniquely Qualified In The Circumstances Of This Case To Determine Performance Metrics Issues, And Their Efforts And Expertise Deserve Deference.

Setting aside the question of what the Commission *can* do, the Commission *should not* give Petitioners a second bite at the apple on performance metric issues. In our federal system, principles of comity counsel federal institutions to pay "a proper respect for state functions." *Younger v. Harris*, 401 U.S. 37, 44 (1971); *see also Oyola v. Bowers*, 947 F.2d 928, 932 (11th Cir. 1991) ("Comity concerns the recognition that one sovereign extends to the legislative, executive and judicial acts of another"), *citing Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). That respect generally translates into a refusal by the federal government to "replow the same ground" worked by state courts and agencies. *United States v. Claiborne*, 92 F. Supp. 2d 503, 509 (E.D. Va. 2000). Nothing in the Act suspends those principles of comity.

Here, principles of comity require deferring to, rather than supplanting, the ongoing role of the state commission. The Virginia Commission both has the expertise and is expending significant resources to resolve these performance metrics issues. AT&T and WorldCom are actively involved in the Virginia Commission's collaborative proceeding, as is Verizon. Indeed, the Collaborative has drawn every affected carrier to the table. The Virginia Commission has given and continues to give each of those carriers, at the expense of considerable time and effort, a full and fair hearing of their evidence and arguments. The Virginia Commission also has made substantial headway on those issues. As a result, the Virginia Commission is uniquely positioned, in the circumstances of this case, to establish a single, statewide performance standard—a standard that is fair for ILECs and CLECs, capable of coherent administration by ILECs, backed by equitable and effective incentives, and sure to promote the desired competition. Indeed, this Commission has expressly recognized that state commissions are "better situated" to develop such standards for their respective states. *MCI Telecommunications Corp. v. U.S. West Communications*, 204 F.3d 1262, 1271 (9th Cir. 2000), *citing* First Report and Order, p. 310. Principles of comity and the congressional plan articulated in the Act require that the efforts and expertise of the Virginia Commission be given effect.

B. The Commission Should Not Needlessly Duplicate The Work Of The Virginia Collaborative.

That the Virginia Commission has been and is now intensively engaged in determining the performance metrics issues is undisputed. Just as importantly, the benefits of the Virginia Collaborative are near at hand. Indeed, AT&T has conceded that the "Collaborative Commission is close to consensus regarding the use of metrics and standards currently used in

New York . . . as the metrics/standards for Virginia."[4] In these circumstances, the Commission has no cause to accept AT&T's and WorldCom's invitation to use this arbitration to establish performance metrics and penalties for any failure to comply with such metrics. In fact, doing so would be impractical and unfair to Verizon since it could subject Verizon to one set of metrics as to AT&T and WorldCom and another set as to all other CLECs in Virginia. The Commission should decline to arbitrate these issues in favor of the standards, measurements, or remedies that soon will be adopted by the Virginia Commission in the context of the Virginia Collaborative.[5]

In light of AT&T's concession, all AT&T and WorldCom can possibly argue is that the Virginia Commission is not acting fast enough. That argument is belied by AT&T's contrary position on the need for consideration of a performance plan in the context of the arbitration of an interconnection agreement in other states. When AT&T filed its corresponding petition for arbitration of an interconnection agreement with Verizon in Maryland on January 26, 2001, it did not insist on inclusion of either performance metrics or a performance plan in the interconnection agreement and expressly declined to ask for arbitration of issues associated with performance metrics and plans. Instead, AT&T was content to defer to the ongoing, generic docket in Maryland in which the performance metrics and plans are being considered on a state-specific, industry-wide basis:

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[4] *See AT&T's Opposition To Verizon Virginia, Inc.'s Motion To Dismiss Or, In The Alternative, To Defer Consideration Of Certain Issues*, p. 13.

[5] AT&T itself has suggested in a number of state arbitrations that issues concerning performance metrics be deferred or dismissed because they had been, or were going to be, addressed in separate state proceedings. *See, e.g.*, AT&T Petition for Arbitration at 7, *In re Applications of AT&T Comms. of Maryland, Inc.*, Case No. 8882 (Md. PSC Jan. 2001); AT&T Petition for Arbitration at 6, *In re: Applications of AT&T Comms. of Pennsylvania, Inc., et al.*, Nos. A-310125F0002, A-310213F0002, A-310258F0002 (Pa. PUC); AT&T Petition for Arbitration at 7, *In re: Applications of AT&T Comms. of NJ, L.P., et al.*, No. TO00110893 (NJ BPU Nov. 2000).

> AT&T did not raise issues pertaining to Performance Measures and Remedies in this arbitration as a result of the on-going collaborative meetings among carriers and facilitated by Commission Staff. To the extent that disputes in the collaborative cannot be resolved among the participating parties, AT&T understands that the Commission will adjudicate those issues. Therefore, AT&T does not find it necessary to raise performance measures and remedies issues at this time in this arbitration.[6]

AT&T likewise deferred to an ongoing, generic docket in New Jersey rather than insisting on inclusion of a performance metrics plan in the interconnection agreement:

> There are a number of open and disputed issues between the Parties that are not being raised in this arbitration proceeding because they already are pending before the Board in other proceedings. Those issues include the following:
>
> * * *
>
> E. Performance Standards and Remedies. The Board established performance metrics for VNJ in its July 13, 2000 Order in Docket Nos. TX95120631 and TX98010010. In the Order, the Board also directed the Technical Solutions Facilities Team (TSFT) to "immediately commence discussions to address remedies for non-compliance with the performance metrics established therein." The issue of performance remedies currently remains pending.[7]

There is no credible basis for AT&T's insistence on a different process in Virginia.

Moreover, there already is a comprehensive set of performance measures and performance assurance plan in place for Virginia. Consequently even if there is any gap in time between the effective date of the interconnection agreement that will result from this arbitration and the effective date of any performance plan arising from the Virginia Collaborative, there is no absence of appropriate incentives to Verizon to ensure performance at parity and in a non-discriminatory manner.

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[6] *Applications of AT&T Communications of Maryland, Inc. and TCG Maryland Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with Verizon Maryland Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996 (Case No. 8882),* Petition for Arbitration at 11.

[7] *In re: Applications of AT&T Communications Of N.J., L.P., TCG Delaware Valley, Inc., Teleport Communications New York (*Docket No. TO00110893), Petition for Arbitration at 13.

Specifically, this Commission already has considered and approved a carrier-to-carrier performance plan for Verizon in connection with its approval of the merger of GTE Corporation and Bell Atlantic Corporation.[8] In that proceeding, the Commission recognized the enormous amount of work that had been accomplished in industry collaboratives at which the Petitioners were represented and fully participated. Accordingly, rather than attempt to create new metrics, the Commission simply conditioned approval of the merger on Verizon's compliance with certain metrics that had been created by industry collaboratives:

> The specific performance measures that Bell Atlantic/GTE will implement in the Bell Atlantic legacy service areas are based upon performance measures developed in a New York collaborative process involving Bell Atlantic's application for in-region, interLATA relief. The performance measures that Bell Atlantic/GTE will implement in the GTE legacy service areas are based primarily upon performance measures applicable to GTE that were developed in a collaborative process in California. *Rather than develop a new set of measures for this merger proceeding, we find that relying upon these performance measures and corresponding business rules, which may be modified over time, will achieve the goals of the Performance Plan and conserve time and resources.*[9]

The Commission specifically provided that Verizon would have to comply with certain performance metrics in each state in its service area until, for example, that state developed its own set of performance measures.[10]

The Commission should likewise decline to establish performance standards or a performance plan in this arbitration proceeding. As the Commission is aware, development of performance metrics and a performance assurance plan is a time-consuming and complex task.

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[8] *See In re Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order, CC Docket No. 98-184, FCC 00-221, ¶¶ 279-318 and Attachment A (rel. June 16, 2000).

[9] *Id.* ¶ 281 (emphasis added and citations omitted).

Such an expenditure of time and resources by this Commission is entirely unnecessary when another competent regulatory agency has made significant progress on those issues already. And here, the Virginia Commission has already established and advanced a collaborative industry process to these issues and this Commission has recognized that such a collaborative process is well-suited to this task.[11] Duplication, expense, and waste of effort accordingly are unnecessary.

CONCLUSION

The Commission should dismiss from consideration in this proceeding issues III-14, IV-120, IV-121, and IV-130.

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[10] *Id.* ¶¶ 279-82.

[11] WorldCom argues that the Virginia Collaborative is an inadequate alternative because the Virginia SCC is proceeding under state law rather than federal law. *See WorldCom's Opposition To Verizon's Motion To Dismiss Or, In The Alternative, To Defer Consideration Of Certain Issues*, p. 18. WorldCom nowhere explains how state law and federal law on performance standards and performance assurance plans might differ. As noted above, WorldCom's failure to do so likely results from the fact that the Telecommunications Act "contains no provisions requiring a public utility commission to create detailed performance standards [and] does not specifically delineate the powers of the public utilities commissions with respect to" liquidated damages and penalty provisions. *U.S. West Communications, Inc. v. Hix*, 57 F. Supp. 2d 1112, 1121 (D. Colo. 1999).

Respectfully submitted,

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Dated: October 12, 2001

CERTIFICATE OF SERVICE

I do hereby certify that the foregoing VERIZON VIRGINIA INC.'S RENEWED MOTION TO DISMISS CONSIDERATION OF ISSUES RELATED TO PERFORMANCE MEASURES AND ASSURANCE PLANS was served as follows this 12th day of October 2001:

TO WORLDCOM as follows:

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Kelly L. Faglioni

_____

Attachment A

Issue III-14 is stated by Petitioners AT&T and WorldCom as follows:

AT&T: What are the appropriate performance metrics and standards and financial remedies that should apply to Verizon's delivery of services under the Agreement, in the event that Verizon fails to meet the performance metrics adopted for Virginia?

WorldCom: What are the appropriate financial remedies that should apply to Verizon's provision of services pursuant to the interconnection agreement?

Issue IV-120 is stated by Petitioner WorldCom as follows:

WorldCom: Should the Interconnection Agreement contain a provision governing available remedies stating that the remedies specified in the Interconnection Agreement are cumulative and are not intended to be exclusive of other remedies available to the injured Party at law or equity? Should the provision also state the Parties' agreement that the self-executing remedies for performance standards failures are not inconsistent with any other available remedy and are intended, as a financial incentive to meet performance standards, to stand separate from other available remedies?

Issue IV-121 is stated by Petitioner WorldCom as follows:

WorldCom: Should the Interconnection Agreement contain a provision (1) requiring Verizon to provide services and perform under this Agreement in accordance with any performance standards, metrics, and self-executing remedies (a) set forth in the Agreement and (b) established by the Commission, the Commission, and any governmental body of competent jurisdiction; and (2) incorporating those standards, metrics and remedies by reference into the Interconnection Agreement?

Issue IV-130 is stated by Petitioner WorldCom as follows:

WorldCom: What are the appropriate performance reports, standards and benchmarks that should apply to Verizon services provided pursuant to the interconnection agreement?